

EXHIBIT A

Goldsmith, Andrew M.

From: Goldsmith, Andrew M.
Sent: Monday, October 12, 2020 6:37 PM
To: 'lawatf@aol.com'; keisha.rice@gmail.com
Cc: Zakarin, Donald S.; Farkas, Ilene S.
Subject: Griffin v. Sheeran - Pre-Trial Consent Order
Attachments: Proposed Pre-Trial Order [Liability Phase] [Draft of Defendants].DOCX; Proposed Pre-Trial Order [Damages Phase] [Draft of Defendants].DOCX

Pat,

I am attaching our drafts of the Consent Pre-Trial Order. I say drafts because, due to the Order of Bifurcation, we have split this into separate Liability and Damages Orders.

A few additional notes:

(1) As we explained previously (and sent you previously), we have changed the formatting of this and renumbered the Exhibits so that the Joint Exhibits begin with 1, the Plaintiffs' Exhibits begin with 101 and the Defendants' Exhibits begin with 201.

(2) We found many of your "Agreed Proposed Facts" largely agreeable, but we revised many of them slightly to include language/wording fair and acceptable to us.

(3) We added in a few additional "Agreed Proposed Facts" to which we do not think the Plaintiffs can have any legitimate objection. Regardless, to the extent the Plaintiffs object to any, please let us know and we can include them in the section for Defendants' Proposed Counter-Findings of Fact.

(4) We found many of the "Agreed Exhibits" objectionable and put these under the "Plaintiffs' Proposed Exhibits" heading.

(5) We included many Exhibits under the "Defendants' Proposed Exhibits" heading because we assume you will object to them. To the extent you do not object, please let us know and we can include them in the Joint Exhibits section.

(6) Your draft of the Pre-Trial Order included your purported audio recording of the Deposit Copy as an Exhibit. You stated last week that you do not intend to introduce that as an Exhibit at trial. If that is so, please remove it from the Pre-Trial Order.

(7) On the Damages Order, we left blank your section of facts and we included the only two Exhibits from your Proposed Exhibits that we thought bear on the damages issues.

(8) Finally, please note that when this is e-filed, we intend to redact the financial numbers for public filing, consistent with the Protective Order, and submit unredacted copies to the Court *in camera*.

We would ask that you please endeavor to return a draft to us by the end of next week.

When we receive your response, we will proceed in accordance with Judge Stanton's procedures.

Regards,

ANDREW M. GOLDSMITH

PRYOR CASHMAN LLP

7 Times Square, New York, NY 10036-6569

Direct Tel: 212-326-0419

[LinkedIn](#) | [Bio](#)

www.pryorcashman.com

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KATHRYN TOWNSEND GRIFFIN, THE ESTATE
OF CHERRIGALE TOWNSEND and THE HELEN
CHRISTINE TOWNSEND MCDONALD TRUST

Plaintiffs,

-against-

EDWARD CHRISTOPHER SHEERAN, p/k/a ED
SHEERAN, ATLANTIC RECORDING
CORPORATION, d/b/a ATLANTIC RECORDS,
SONY/ATV MUSIC PUBLISHING, LLC, and
WARNER MUSIC GROUP CORPORATION, d/b/a
ASYLUM RECORDS

Defendants.

ECF CASE

17-cv-5221 (LLS)

**PRE-TRIAL CONSENT ORDER
[LIABILITY PHASE]**

THE PARTIES, having exchanged proposed findings and counter-findings of fact in accordance with the Pre-Trial Procedures of United States District Judge Louis L. Stanton, hereby submit the following:

A. Agreed Findings of Fact

1. In 1973, Edward Benjamin Townsend (“Townsend”) authored the musical composition “Let’s Get It On.”

2. On or about July 17, 1973, music publishers Stone Diamond Music Corp. (“Stone Diamond”) and Cherritown Music Co. (“Cherritown Music”), Ed Townsend’s music publishing company, as copyright owners, filed an Application for Registration of a Claim to Copyright with the U.S. Copyright Office for the musical composition “Let’s Get It On,” depositing with the Copyright Office two complete copies of the best edition of “Let’s Get It On” then published, which copies consisted of written sheet music (the “Deposit Copy”).

5. Defendants dispute Plaintiffs' Proposed Findings of Fact Numbered 8, 10 and 16, as they misstate and misrepresent evidence as set forth below in Defendants' Proposed Counter-Finding Numbered 6, 13 and 21.

Defendants' Proposed Liability Counter-Findings Of Fact

1. In authoring "Thinking Out Loud," Sheeran and Wadge did not copy from "Let's Get It On." (Trial Testimony of Sheeran, Wadge, Jake Gosling and Dr. Lawrence Ferrara; Deposition of Ed Sheeran at 59:22-24, 62:12-67:10, 73:14-77:10, 78:23-79:8, 80:24-82:4, 82:20-83:7).

2. Sheeran and Wadge independently created "Thinking Out Loud." (Trial Testimony of Ed Sheeran, Amy Wadge, Jake Gosling and Dr. Lawrence Ferrara; Deposition of Ed Sheeran at 59:22-24, 62:12-67:10, 73:14-77:10, 78:23-79:8, 80:24-82:4, 82:20-83:7).

3. After Sheeran and Wadge co-authored "Thinking Out Loud" at his home in England on acoustic guitar, Sheeran recorded what would become the commercially released version of "Thinking Out Loud" at Sticky Studios in England along with several credited session musicians and Jake Gosling, who also produced the recording. (Trial Testimony of Ed Sheeran and Jake Gosling).

4. The chord progression featured in "Let's Get It On" – I-iii-IV-V – is a commonplace musical building block that was in common use prior to "Let's Get It On" and after "Let's Get It On" (but before the release of "Thinking Out Loud"). (Trial Testimony of Dr. Lawrence Ferrara; Order dated August 18, 2020 (ECF No. 138)).

5. At least twenty-five (25) songs that predate "Let's Get It On" and seventeen (17) additional songs released between 1973 and 2013 (before the 2014 release of "Thinking Out Loud")

– a total of at least forty-two songs – embody the basic I-iii-IV-V chord progression in “Let’s Get It On.” (Trial Testimony of Dr. Lawrence Ferrara).

6. The chord progressions used in “Thinking Out Loud” are different from the chord progressions used in “Let’s Get It On.” (Trial Testimony of Dr. Lawrence Ferrara).

7. The principal chord progression used in “Thinking Out Loud” is I-I/3-IV-V; the second chord – both during the first 24 seconds of the song and throughout the song’s duration – is a “I/3” chord (*i.e.*, D major with F# as the lowest note), and not a “iii” chord (*i.e.*, an F# minor chord). (Trial Testimony of Dr. Lawrence Ferrara).

8. At least four songs that predate “Let’s Get It On” and six songs released between 1973 and 2013 (before the 2014 release of “Thinking Out Loud”) – a total of at least ten songs – embody the basic I-I/3-IV-V chord progression in “Thinking Out Loud.” (Trial Testimony of Dr. Lawrence Ferrara).

9. The chord progression in “Let’s Get It On” appears in rudimentary guitar method books. (Trial Testimony of Dr. Lawrence Ferrara).

10. The anticipation of chord changes is a centuries-old commonplace musical building block and technique that was in common use prior to “Let’s Get It On” and after “Let’s Get It On” (but before the release of “Thinking Out Loud”). (Trial Testimony of Dr. Lawrence Ferrara; Order dated August 18, 2020 (ECF No. 138)).

11. The harmonic rhythm of “Thinking Out Loud” is different from the harmonic rhythm notated in “Let’s Get It On.” (Trial Testimony of Dr. Lawrence Ferrara).

12. Ed Sheeran used a similar anticipation technique in at least twenty songs that he wrote or co-wrote prior to writing “Thinking Out Loud.” (Trial Testimony of Dr. Lawrence Ferrara and Ed Sheeran).

13. Amy Wadge used a similar anticipation technique prior to co-authoring “Thinking Out Loud” in a song that also features a chord progression similar to the one used in “Thinking Out Loud.” (Trial Testimony of Dr. Lawrence Ferrara and Amy Wadge).

14. The selection and arrangement of the chord progression and harmonic rhythm in “Let’s Get It On,” which are commonplace musical building blocks and unprotectable elements, are not sufficiently numerous enough or sufficiently original enough to qualify for copyright protection.¹

15. The selection and arrangement of the chord progression and harmonic rhythm in “Thinking Out Loud” is not identical or virtually identical to the combination of the chord progression and harmonic rhythm in “Let’s Get It On.” (Trial Testimony of Dr. Lawrence Ferrara).

16. The alleged similarities between the chord progressions and harmonic rhythms in “Let’s Get It On” and “Thinking Out Loud” represent commonplace musical building blocks that exist in at least two successful songs that predate “Let’s Get It On” (“Georgy Girl” (1967) and “Since I Lost My Baby” (1966, as recorded by Ray French)) and in at least one song that postdates “Let’s Get It On” but predates “Thinking Out Loud” (“Six Pack Summer” (2000)). (Trial Testimony of Dr. Lawrence Ferrara).

17. There are no objectively significant similarities between the melodies in “Let’s Get It On” and “Thinking Out Loud.” (Trial Testimony of Dr. Lawrence Ferrara).

18. Dr. Stewart has altered and otherwise manipulated the pitch sequences of the melodies he has attempted to place in issue in order to manufacture an appearance of similarity where none exists. (Trial Testimony of Dr. Lawrence Ferrara).

¹ Defendants submit this presents a question of law to be decided by the Court; however, in the event the Court views this as an issue to be determined by the trier of fact, Defendants include this Proposed Counter-Finding herein.

127	“Sounding Out Pop, Analytical Essays in Popular Music, Marvin Gaye As Vocal Composer” by Andrew Flory	<p>Rule 401; Rule 403; Rule 802.</p> <p>To the extent Plaintiffs rely on this article to introduce evidence regarding the creation of “Let’s Get It On,” it represents inadmissible hearsay.</p> <p>To the extent Plaintiffs seek to use this Exhibit to support an argument that the “Let’s Get It On” Deposit Copy is based on, or derives from, the Marvin Gaye Recording, such matters are irrelevant and prejudicial to Defendants.</p>
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Defendants’ Disputed Exhibits

The Defendants will offer the following exhibits to be received in evidence, to which Plaintiffs object:⁵

Exhibit No.	Description	Objection(s)
201	The “Let’s Get It On” Deposit Copy with Dr. Ferrara’s handwritten notations	
201	Excerpts from the book “Money Chords” by Richard J. Scott	
202	Excerpts from the book “Guitar For Advanced Beginners” by Dan Emery	
203	Excerpts from the book “How To Play Rock ‘N’ Roll Piano” by Palmer Hughes	
204	Excerpts from the book “Chord Progressions for Guitar” by Tom Kolb	
205	Excerpts of the Deposition of Helen McDonald – specifically, pages 1-3, 16-24, 79-81, 87-91 and 112	

⁵ Defendants only intend to introduce Exhibits 211-228 in the event the Court overrules their objection to the admission of Plaintiffs’ Proposed Exhibit No. 124 (the “Medley” video of “Let’s Get It On” and “Thinking Out Loud”).

Exhibit No.	Description	Objection(s)
206	Dr. Stewart's "Score" of "Thinking Out Loud" (Farkas Summary Judgment Decl. Ex. 8)	
207	Audio Exhibit of "Melody A" as played by Dr. Lawrence Ferrara on piano	
208	Audio Exhibit of "Melody B" as played by Dr. Lawrence Ferrara on piano	
209	Audio Exhibit of "Melody C" as played by Dr. Lawrence Ferrara on piano	
210	List of 52 Songs that embody the basic I-iii-IV-V chord progression used in "Let's Get It On" or the basic I-I/3-IV-V chord progression used in "Thinking Out Loud"	
211	Ed Sheeran Live Performance of Don't/Loyal/No Diggity/The Next Episode/Nina dated July 30, 2014 (Available at: https://www.youtube.com/watch?v=ZpiNUKpGI88)	
212	Ed Sheeran Live Performance of Don't/No Diggity/Nina dated March 20, 2015 (Available at https://www.youtube.com/watch?v=f4DtfiKeXsY)	
213	Ed Sheeran Live Performance of Don't/Nina dated November 27, 2014 (Available at: https://www.youtube.com/watch?v=zn0uEIZ6Jiw)	
214	Ed Sheeran Live Performance of Kiss Me/Thinking Out Loud dated December 2, 2015 (Available at https://www.youtube.com/watch?v=uV6osGMdf6Q)	
215	Ed Sheeran Live Performance of Kiss Me/Thinking Out Loud dated September 17, 2015 (Available at https://www.youtube.com/watch?v=d4l2LzTODUU)	

Dated this _____ day of November, 2020.

FRANK & RICE, P.A.

By: _____
Patrick R. Frank, Esq.
Keisha D. Rice, Esq.
Katherine Viker, Esq.
325 West Park Avenue
Tallahassee, Florida 32301
Telephone: (850) 629-4168
Facsimile: (850) 629-4184
Attorneys for Plaintiffs

PRYOR CASHMAN LLP

By: _____
Donald S. Zakarin
Ilene S. Farkas
Andrew M. Goldsmith
7 Times Square
New York, New York 10036
(212) 421-4100
Attorneys for Defendants

SO ORDERED.

Dated this _____ day of November, 2020.

The Honorable Louis L. Stanton
United District Court Judge